*[Editor's note: The dissenting judgment of His Lordship Abdul Aziz Mohamad JCA in Lam Hong Hardware Co Sdn Bhd lwn. Incacon Sdn Bhd & Yang Lain [2006] 2 CLJ 1129 was received after the majority judgment had been submitted to the printers]*

**LAM HONG HARDWARE CO SDN BHD**

**lwn.**

**INCACON SDN BHD & YANG LAIN**

MAHKAMAH RAYUAN, PUTRAJAYA
MOKHTAR SIDIN HMR
ABDUL AZIZ MOHAMAD HMR
NIK HASHIM HMR
[RAYUAN CIVIL NO: P-02-703-2000]
2 MEI 2006

**JUDGMENT**

**Abdul Aziz Mohamad JCA (dissenting):**

**[1]** It is necessary to set out the sequence of events that led up to the appeal before us.

**[2]** On 16 July 1997 UMW Corporation Sdn Bhd ("UMW"), by their architects, issued to Incacon Sdn Bhd ("Incacon") a letter of acceptance of Incacon's offer to carry out for UMW the construction of a Regional Facilities Centre ("the project"). Incacon accepted the terms, conditions and stipulations in UMW's letter on the same day.

**[3]** By letter dated 18 August 1997 EON Bank Berhad ("EBB") informed Incacon of their approval of credit facilities for Incacon's utilization for several purposes, one of which was related to the project. EBB required various types of securities for the credit facilities. In respect of the purpose related to the project the securities were to be:

1. Deed of Assignment between Incacon Sdn Bhd and EON Bank Berhad (EBB) wherein Incacon Sdn Bhd will assign all contract proceeds to EBB.

2. Irrevocable Letter of Instruction by Incacon Sdn Bhd to EBB to UMW Corporation Bhd to remit all contract proceeds to EBB for the credit of Incacon Sdn Bhd's account. UMW Corporation Bhd is to duly acknowledge receipt of the letter.

**[4]** On 27 August 1997 Incacon wrote to UMW a letter about the project, in which Incacon said:

> Please be informed that our Company has been granted Credit Facilities from EON Bank Berhad which requires that all progress payments for the above-mentioned project, to be made payable to the said Bank.
>
> Therefore, in view of the above, we will appreciate if your good company can clearly state the following "Payee" information on all cheques of the progress payments, payable to us:
>
> > "Name of Payee": INCACON SDN BHD – EON Bank Berhad (A/C No: 015-10-01308-7)
> >
> > The progress payments made by you to EON Bank Berhad pursuant to this letter shall be deemed as payments made to us and we shall have no claim against you for such payments.
> >
> > The above arrangement shall be continuing until such time as EON Bank Berhad notifies you in writing to terminate the arrangement.

At the foot of the letter UMW signed their "consent to the above arrangement". That letter must have been intended to be the aforesaid security No. 2 required by EBB. Although EBB's requirement for that security was UMW's acknowledgment of receipt of the letter, UMW did more than acknowledge receipt of the letter. They consented to the arrangement explained in the letter.

**[5]** The deed of assignment, which was security No. 1 that EBB required, was executed on 17 September 1997. By section 1.03 of the deed, Incacon assigned to UMW the proceeds of "the contracts" as defined in section 2.01. The definition was wide but specifically included "the contracts already entered into" with UMW for the project.

**[6]** On 27 February 1998 UMW and Incacon executed the formal agreement in respect of the project.

**[7]** On 18 June 1998 Lam Hong Hardware Co Sdn Bhd ("Lam Hong") instituted a writ action against Incacon as first defendant and Miw Yu Hock trading as MIW Engineering ("MIW") as second defendant. MIW was averred to be Incacon's agent, servant or subcontractor for the project. The claim was for the

balance of the price of construction materials delivered allegedly on the order of MIW at the site of the project and allegedly used by Incacon for the project.

**[8]** On 24 September 1998, on Lam Hong's *inter partes* application, a prohibitory injunction was granted against Incacon (and also against UMW) to ensure that out of sums paid or to be paid by UMW to Incacon for the project, a sum of RM1.0 million was preserved for Lam Hong's benefit in the event that they succeeded in their action against Incacon.

**[9]** On 31 May 1999 EBB filed an application in Lam Hong's action for leave to intervene in the action in order to obtain an order, which EBB also sought in the application, that the order of injunction of 24 September 1998 be amended so that UMW be ordered to release to EBB moneys payable by UMW to Incacon for the project and withheld by UMW.

**[10]** On 9 September 1999, on Incacon's admission in Lam Hong's action, judgment was given for Lam Hong against Incacon for the sum of RM693,365.66. It was also ordered, in view of the injunction of 24 September 1998, that UMW release that sum to Lam Hong within a week and release to Incacon any balance that remained due to Incacon for the project.

**[11]** On 8 October 1999 Lam Hong's action was amended by adding UMW as third defendant.

**[12]** On 22 September 2000, on the aforesaid application of EBB of 31 May 1999, it was ordered that the injunction of 24 September 1998 be amended and that, from the amount of RM1.0 million retained by them of moneys due to Incacon for the project, UMW release to EBB a sum of RM712,332.29 with interest thereon from 1 July 1999 until settlement. It was also ordered that any balance from the RM1.0 million after payment to EBB be released to Lam Hong and that the said payments to EBB and Lam Hong be a full discharge of UMW's liability to Incacon.

**[13]** The appeal before us was Lam Hong's appeal against the order of 22 September 2000. In the High Court, the parties in EBB's application that resulted in that order were EBB, Lam Hong and UMW. Although in the High Court UMW opposed EBB's application, they did not take a stand in the appeal since they had complied with the order of 22 September 2000 by

paying out to EBB and Lam Hong the RM1.0 million that was due from them to Incacon. Lam Hong's counsel informed us that after paying EBB there was a balance of RM2,000 that was paid to Lam Hong. So the parties in the appeal were Lam Hong and EBB.

**[14]** Although Lam Hong's memorandum of appeal contained grounds of appeal in fifteen paragraphs, their counsel's written outline submission for the appeal advanced only three reasons why the appeal should be allowed. However, two of those reasons were not pursued in counsel's oral submission and were therefore abandoned. One of the two reasons involved the argument that the injunction order of 24 September 1998 had become spent with the entry of the final judgment against Incacon on 9 September 1999. The other reason was that EBB had no interest in the subject matter of Lam Hong's action. The remaining reason, and the one that was pursued in oral submission in the appeal, consisted of the argument that the assignment of 17 September 1997 was not valid as against Lam Hong and UMW.

**[15]** That argument, as presented in the written outline submission and in oral submission, did not rely on anything in s. 4(3) of the Civil Law Act 1956. The main basis of the argument was cl. 17(1) of the formal agreement in respect of the project between UMW and Incacon dated 27 February 1998. That clause provided that "(Incacon) shall not assign ... the right to receive payment for any part of the Works to be carried out under this contract or the right to receive the whole or any part of the Contract Sum without the prior written consent of (UMW)".

**[16]** I was of the view that the prohibition of cl. 17(1) could not operate to affect the validity of the assignment because the deed of assignment was executed (on 17 September 1997) before the prohibition in cl. 17(1) came into being (on 27 February 1998), so that Incacon were not under any prohibition when they executed the assignment. Lam Hong's counsel argued that EBB would have known on the date of the assignment that the contract between Incacon and UMW would be a PAM standard contract which would contain the prohibition in cl. 17(1). I was of the view that there was no basis for imputing that knowledge to EBB and that even if EBB had that foreknowledge it would make no difference to the fact that when the assignment was executed Incacon were not subject to the prohibition.

**[17]** Even if cl. 17(1) applied so as to require UMW's prior written consent to the assignment, I was of the view that the prior written consent was given by UMW at the foot of Incacon's letter to them dated 27 August 1997, where they expressed their consent to the "arrangement" set out in that letter of Incacon's, which arrangement amounted to or implied an assignment to EBB of payments due to Incacon from UMW.

**[18]** Lam Hong's counsel advanced in oral submission another ground for contending that the assignment was not valid. The ground was that section 3.02 of the deed of assignment had not been complied with. The section provided as follows:

> For the purposes of effectuating the afore-said assignment the Assignor shall serve on each of the Awarders a copy of this Deed of Assignment and a Letter of Notification and Authority in such terms as the Assignee may require to authorise the relevant Awarders to make or pay all payments due and payable under the Contracts to EON BANK BERHAD. The Assignee will release the AAPC facility or any part thereof progressively upon the Assignor satisfying the Assignee that the relevant Awarders has or have notice of this Assignment.

In respect of the project, the awarder was UMW. The part of the section that was said not to have been complied with was the requirement that Incacon the assignor serve on UMW a copy of the deed of assignment.

**[19]** A copy of the deed of assignment was in fact given to UMW with EBB's solicitors' letter dated 7 January 1999, before EBB applied to intervene to obtain the order that was under appeal. Although it was given more than a year after it was executed, and by EBB the assignee and not by Incacon, I was of the view that this did not invalidate the assignment. The purpose of the requirement of section 3.02 was only to "effectuate" the assignment, that is to bring it to accomplishment, so that UMW would not be paying the project moneys to Incacon but would be paying them to EBB instead. It was clear from the second sentence of the section that the section was merely a safeguard for EBB, who wanted to make sure that, before releasing the facility to Incacon, UMW were aware of the assignment and would be paying the project moneys to EBB instead of to Incacon. Failure to have UMW notified or delay in notifying them would be detrimental to EBB should they release the facility to Incacon notwithstanding the failure or delay, and also to Incacon

in that EBB could refuse to release the facility until UMW were notified, but would not affect the validity of the deed of assignment. The failure or delay would affect only the accomplishment of the purpose of the deed of assignment.

**[20]** In his oral submission Lam Hong's counsel also adverted to the fact, as stated in para. 5 above, that the deed of assignment dated 17 September 1999 referred to the contract for the project as "already entered into", and contended that it had not yet been entered into but was entered into only subsequently, only 27 February 1998. The ultimate argument was presumably, because it was not expressed, that the deed of assignment did not effectively assign the proceeds of the contract for the project to UMW. I was of the view that the contract was already entered into at the date of the assignment and that the contract was UMW's letter of acceptance of 16 July 1997. It contained the essential terms and conditions to constitute it a binding contract. There was nothing conditional, tentative or provisional about it. The agreement signed on 27 February 1998 was merely to formalize the contract and provide the details. This was clear from the last paragraph of the letter which said: "The formal contract documents are being prepared and you will be notified, in due course, when they are ready for your endorsement".

**[21]** As I found that counsel for Lam Hong the appellants failed in his argument that the assignment or deed of assignment was invalid, which was his sole reason for urging that the appeal be allowed, I decided that the appeal be dismissed.